Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1

AMERICAN EXPORT LINES, INC.,

Petitioner,

—against—

GILBERTO ALVEZ and JOSEPH VINAL
SHIP MAINTENANCE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT JOSEPH VINAL SHIP MAINTENANCE, INC.

PETER M. PRYOR
199 Church Street
New York, N.Y. 10007

WILLIAM M. KIMBALL
1 Battery Park Plaza
New York, N.Y. 10004

Counsel

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Opinions Below

The unreported opinion of the Supreme Court of the State of New York, County of New York, is printed in appendix A to the petition, p. A 1.

The opinion of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, is reported at 59 A.D. 2d 883, 399 N.Y.S. 2d 673, and is printed in appendix B to the petition, pp. A 4-5.

The opinion of the Court of Appeals of the State of New York is reported at 46 N.Y. 2d 634, 415 N.Y.S. 2d 979, and is printed in appendix D to the petition, pp. A 8-19.

Jurisdiction

The final judgment* and remittitur of the Court of Appeals of the State of New York, copy appended hereto, was filed in the court of original instance, pursuant to New York CPLR 5524(b), on April 5, 1979, and the petition for certiorari was filed less than ninety days later, on July 2, 1979.

Jurisdiction is properly invoked under 28 U.S.C. 1257(3).

Questions Presented

1. When determining whether a claim exists under the general maritime law, are state courts bound by the decision of a federal court of appeals if there is no decision by this Court?

2. Under the general maritime law, does the wife of a harbor worker who is tortiously injured aboard a ship in territorial waters of the United States have a damages claim against the ship's owner for her lost consortium resulting from her husband's injury?

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* In addition to being procedurally final, the disposition satisfies both the third and fourth categories of finality explicated in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 481-483 (1975).

Statement

Respondent Alvez, a harbor worker, sued in New York County Supreme Court to recover damages from petitioner American Export Lines on general maritime law claims of negligence and unseaworthiness for injury which he sustained aboard petitioner's ship while docked in Brooklyn, N.Y. Petitioner impleaded respondent Joseph Vinal Ship Maintenance, Inc. for indemnity.

Alvez moved to amend his complaint to allege a damages claim against petitioner for his wife's lost consortium resulting from his injury. The New York County Supreme Court denied the motion on authority of *Igneri v. Cie. de Transports Oceaniques,* 323 F. 2d 257 (2 Cir. 1963), cert. den. 376 U.S. 949 (1964), which specifically holds that such a claim does not exist under the general maritime law. The Appellate Division of the New York Supreme Court reversed the denial, relying on *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573 (1974), which holds that the widow of a deceased harbor worker has a valid damages claim under general maritime law against a ship's owner for lost consortium resulting from her husband's fatal injury aboard ship while in U.S. territorial waters, therein contrasting its decision with *Igneri,* which the Court did not explicitly overrule, and on *Pesce v. Summa Corp.,* 54 C.A. 3d 86, 126 Cal. Rptr. 451 (2nd Dist. 1975), holding diametrically contrary to *Igneri,* which the intermediate California Court opined "has been overruled by *Sea-Land Services* [*v. Gaudet*] as construed by *Skidmore*" [*v. Grueninger,* 506 F. 2d 716 (5 Cir. 1975)], a wrongful death action by the husband of a motor

boat passenger who was killed when the boat collided with a barge, holding that the husband can recover damages for loss of his wife's consortium, which neither cited nor had any occasion to distinguish *Igneri.*

The New York Court of Appeals, one Judge dissenting, affirmed the Appellate Division on the ground that "the *ratio decendendi* of the *Igneri* decision reveals an erosion of its theoretical underpinnings so severe as to precipitate its collapse under its own weight", citing as "the law of the land" a string of state court cases which recognize a wife's statutory or common law claim for lost consortium due to her husband's injury, and *Sea-Land Services, Inc. v. Gaudet,* despite being "cognizant that the Fifth Circuit has interpreted *Gaudet (supra)* as limited to authorizing recovery for loss of consortium under the general maritime law to wrongful death actions", referring to *Christofferson v. Halliburton Co.,* 534 F. 2d 1147, reh. en banc den. 542 F. 2d 1174 (5 Cir. 1976), which, largely on authority of *Igneri,* holds that the wife of a seaman injured in U.S. territorial waters has no claim for lost consortium under the Jones Act, 46 U.S.C. 688, or general maritime law.

Reasons For Granting The Writ

The petition raises a vital, first impression reverse *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), question "touching the accommodation of state and federal interests under the Constitution", *cf., Kosydar v. National Cash Register Co.,* 417 U.S. 62, 65 (1974), and the "imperative doctrine" of "the uniformity and supremacy of the maritine law", *Kossick v. United*

Fruit Co., 365 U.S. 731, 738 (1961). In "too broadly", *cf., Oregon v. Mathiason,* 429 U.S. 492, 493 (1977), holding that a widow's consortium claim sanctioned by *Sea-Land Services, Inc. v. Gaudet* "carries over", *cf., Republic Steel v. Maddox,* 379 U.S. 650, 652 (1965), to a wife's consortium claim, the New York Court of Appeals has decided an important Federal question contrary to *Christofferson v. Halliburton Co.,* 534 F. 2d, p. 1151, n. 1, which should be settled by this Court because of its "'responsibility for fashioning the controlling rules of admiralty law.'" *United States v. Reliable Transfer Co.,* 421 U.S. 397, 409 (1975).

The New York Court of Appeals recognized that it was in the reverse *Erie R. Co. v. Tompkins* situation of seeking the answer to a general maritime law question; "an answer obtainable solely by recourse to Federal law." (pet. p. A 11). Under the *Erie* doctrine analogous to that situation, the New York Court's function was "to ascertain and apply that law even though it has not been expounded by the highest court", and the New York Court "was not at liberty to reject those decisions merely because it did not agree with their reasoning", *Fidelity Trust Co. v. Field,* 311 U.S. 169, 177, 179 (1940), or free to apply "what it considered to be the better rule", *West v. A.T. & T. Co.,* 311 U.S. 223, 235 (1940), "in the absence of convincing evidence that the highest court * * * would decide differently." *Stoner v. New York Life Ins. Co.,* 311 U.S. 464, 467 (1940).

Contravening those mandates, the New York Court sought "a uniform Federal rule albeit one established by lower Federal courts" (pet. p. A 11); "any estab-

lished and inflexible rule barring recognition of the claim before us." (pet. p. A 17). That search disclosed the only Federal court decision which, contrary to the principle of *stare decisis,* refused to abide *Igneri* on the ground of conjectured obsolescence, *Giglio v. Farrell Lines, Inc.,* 424 F. Supp. 927, 930 (S.D.N.Y. 1977), app. den. (2 Cir. No. 77-8014, 2/17/77)*; *cf., Westcott v. McAllister Bros., Inc.,* 463 F. Supp. 1039 (S.D.N.Y. 1978), a later decision by the same Court relying on *Igneri.* The search also led to the previously cited California Court opinion in *Pesce v. Summa Corp.,* which the New York Court found more appealingly in accord with its own rationale in *Millington v. Southeastern Elevator Co.,* 22 N.Y. 2d 498, 293 N.Y.S. 2d 305 (1968). The irony of any reliance on *Pesce,* which misconceived that *Igneri* had been overruled by *Skidmore v. Grueninger,* 506 F. 2d 716 (5 Cir. 1975), is that 7 months after *Pesce,* the Fifth Circuit Court of Appeals in *Christofferson* rejected the "argument that *Igneri* would now be decided differently" and distinguished its earlier decision in *Skidmore* on the ground that it "involved a wrongful death claim", 534 F. 2d, pp. 1150, 1151, n. 1.

Instead of ascertaining the general maritime law by the analogous *Erie* rule so as to preserve the essential uniformity of that law and prevent the same sort of forum conflicts and consequent unequal protection of the law which motivated *Erie,* the New York Court searched for rogue opinions and declined

* The Circuit Court's refusal "to review the lower court's decision" was not "clear and persuasive indication that its pronouncement [in *Igneri*] will be modified, limited or restricted." *West v. A.T. & T. Co.,* 311 U.S., pp. 236, 237.

to follow *Igneri* despite *Christofferson,* both of which it deemed to have been wrongly decided and eroded by "the law of the land" as enunciated by New York, California, and most other states. Thus, until this Court otherwise declares, the general maritime law in New York on whether the wife of an injured harbor worker has a valid claim for her lost consortium depends on the forum. If the suit is in a State court, then the decision below governs. But if the suit is in a Federal court in New York, then, as dissenting Judge Jones noted, "any decision we hand down will have no precedential significance in the Federal courts" (pet. p. A 19), as is proven by the recent memorandum order in *Manolakis v. Indo Pacific Carriers* (S.D.N.Y. No. 78 Civ. 1075, 6/26/79), copy appended hereto.

This existing, and potentially growing, unconstitutional chaos can only be eliminated by this Court, the sooner the better. If wives of injured harbor workers have valid general maritime law claims for lost consortium, they should be able to enforce those claims in any court of competent jurisdiction, Federal or State. And if they do not, then defendants should not be held liable for those claims because the particular forum unlawfully chooses to allow them.

Conclusion

The petition should be granted.

Respectfully submitted,

PETER M. PRYOR
WILLIAM M. KIMBALL
Counsel

New York, N.Y.
July 26, 1979

Court of Appeals
State of New York

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

1 No. 113

Gilberto Alvez,

Respondent,

vs.

American Export Lines, Inc.,

Appellant,

vs.

Joseph Vinal Ship Maintenance, Inc.,

Third-Party Respondent.

The appellant(s) in the above entitled appeal appeared by Haight, Gardnner, Poor & Havens;
the respondent(s) appeared by Paul C. Mathews.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Question certified answered in the negative. Opinion by Jasen, J. Concur: Cooke, Ch.J., Gabrielli, Wachtler and Fuchsberg, JJ. Jones, J., dissents and votes to reverse in an opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County,

there to be proceeded upon according to law.

CO. CLERK'S OFFICE
NEW YORK
APR 5 - 1979

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Joseph W. Bellacosa

Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, April 3, 19 79

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NICHOLAS and KETTY MANOLAKIS,

Plaintiffs,

-against-

INDO PACIFIC CARRIERS, INC. and GROTON PACIFIC CARRIERS, INC.,

Defendants.

78 CIV 1075 (LBS)

MEMORANDUM

U.S. DISTRICT COURT FILED JUN 27 1979 S.D. OF N.Y.

SAND, D.J.

Defendants' motion to dismiss the cause of action asserted by plaintiff Ketty Manolakis for loss of consortium and society of her husband is granted. Westcott v. McAllister Bros., Inc., 463 F.Supp. 1039 (S.D.N.Y. 1978).

Plaintiff's oral application for certification pursuant to 3 U.S.C. § 1292(b) of the question whether a cause of action for loss of consortium lies where the husband seaman sues under the Jones Act, 46 U.S.C. § 688 is denied. Although it cannot be denied that there are "substantial grounds for difference of opinion" as required by 28 U.S.C. § 1292(b) (cf. Alvez v. American Export Lines, Inc., New York Court of Appeals, April 3, 1979), the Second Circuit has already declined one application to consider a like question on certification. Giglio v. Farrell Lines, Inc., 424 F.Supp. 927 (S.D.N.Y. 1977), pet. for leave to app. den., No. 77-8014 (2d Cir. Feb. 17, 1977).

MICROFILM JUN 28 1979

SO ORDERED.

Dated: New York, New York
June 26, 1979

U.S.D.J.